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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 298

C. A. ROBERTS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.

L. S. PARSONS,

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THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice of the United States and
the Associate Justices of the Supreme Court of the
United States:*

The petitioner, C. A. Roberts, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment of that Court rendered in the above entitled cause on July 28, 1943 (R. 179).

The Opinion Below.

The opinion of the Circuit Court of Appeals is not yet reported, but has been forwarded to this Court by the Clerk

of the United States Circuit Court of Appeals for the Fourth Circuit, and will be found at pages 172-178 of the transcript of the record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended (28 U. S. C. A., Section 347a).

Summary Statement of the Matter Involved.

The petitioner, C. A. Roberts, was engaged in the fish business in the city of Norfolk, Virginia, for a number of years. He was a man of high reputation for honesty and fair dealing (Harris, R. 92-93; Brown, 100-101).

He was indicted in September, 1942, in the District Court of the United States for the Eastern District of Virginia for an alleged violation of Title 18, Section 80, U. S. C. A., the provisions of which are as follows:

“Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious or fraudulent, * * * shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.”

The indictment contains five counts, all covering fish sold to the Government upon contracts entered into on competitive bidding, and the charges made against the accused run from January, 1940, down to September, 1941.

The accused by counsel moved the Court for a bill of particulars (supporting brief, pp. 23-24) setting forth the name

of the officer or person to whom the claims were presented for payment or approval and the dates on which they were presented; also the dates and amounts of the purchases upon which the Government was basing the charges. The Court required the United States Attorney to give the dates and amounts involved, but refused to require him to furnish the name of the officer or person in the civil, military or naval service of the United States or any department thereof to whom the claims were presented for payment or approval. Exception was duly taken to the refusal of the Court in that regard.

The crux of the charge, of course, is that a false claim was presented to some person or officer in the service of the United States for payment or approval, and the information requested was considered essential in the preparation of the case for the defense. The failure to give this information, later, during the trial, presented difficulties which could have been avoided.

All five counts charged the accused with delivering frozen fish in lieu of fresh chilled fish. The trial jury returned a verdict of not guilty on counts 1, 2 and 3, and guilty on counts 4 and 5. The evidence in the case was entirely circumstantial.

Motion was made for a directed verdict at the close of the Government's evidence and again at the close of all the evidence (R. 173). After the verdict was returned a motion was made to set aside the verdict and also in arrest of judgment (R. 173). Motion was also made for a new trial on the grounds of after discovered evidence (R. 116-123). All of these motions were denied.

One other motion, which presents a question that had never been passed upon before by this Court of any United States Circuit Court of Appeals, was made "to allow counsel for the accused to make argument, based upon the evidence adduced, with reference to the failure of the accused

to take the witness stand in his own behalf, thereby waiving any objections to argument by the attorney for the Government'' (R. 178). This motion arose out of a demand by the Court on counsel to say whether the accused would take the witness stand, (R. 85). (Accused's appendix, p. 85) and the introduction, over objection, of disconnected collateral evidence tending to defame the previous good character of the accused (R. 52-60).

The errors assigned in the court below are made a part of the record in the appendix for the accused, beginning on page 1 and ending on page 3 (R. 1-3). The overruling of these same assignments is charged as error of the United States Circuit Court of Appeals for the Fourth Circuit. They will be grouped and referred to in the brief attached to and in support of this petition.

Reasons for Allowance of the Writ.

The motion in arrest of judgment raised an important question of Federal law which has not been and should be settled by this Court. The cases cited in direct support of the motion in arrest of judgment were *United States v. Glover*, 32 F. 142, *United States v. Wallace*, 40 F. 144, and *United States v. Christoferson*, 261 F. 225. (Supporting brief, pp. 20-25).

These cases directly decided that the naming of the officer and his authority for approval or payment was an integral and essential part of the statute and had to be alleged. No claim was made that these cases had not been decided correctly, and the United States Circuit Court of Appeals did not overrule them, but made a suggestion, which we do not believe is warranted, by saying that they were decided before the statute was amended (R. 176). So far as we can see, the statute in that respect has never been amended.

Another most important question involves a highly controversial subject; that is to say, the question of the right

of counsel for the accused to refer to his absence from the witness stand. It is contended that the provision which prevents the United States Attorney or other prosecuting officer from referring to the absence of the accused from the witness stand was made entirely for the benefit of the accused and may be waived and reasonable argument with reference thereto made. The Court refused to allow that to be done.

It has been held:

“as there is danger that the jury, knowing that the law now permits a defendant to testify, may draw inferences against him from his omission so to do, counsel may properly, in addressing the jury, insist and enlarge upon his constitutional and legal right in this respect. (*Commonwealth v. Scott*, 123 Mass. 239).

Apparently the courts have uniformly held that, where the question of the failure to take the witness stand was referred to by the defense, a waiver arose and the accused lost his right to object to argument by the prosecuting attorney to draw inferences of guilt from the failure of the accused to take the witness stand.

Perhaps the question here has never reached an appellate Federal court for decision because of the general practice of the courts not to limit counsel for the accused in his argument and to allow reasonable argument to be presented upon this difficult question.

There has been considerable agitation and discussion of this subject before the American Bar Association and other such bodies. The question ought to be decided and settled by this Court. (See 31 Michigan Law Review, 226, at pp. 230-231, for a discussion of resolutions of the American Law Institute and the American Bar Association. See brief, p. 27).

The allowance of the testimony of Johnnie M. Hunt and Mrs. Edna Oliver as to unrelated matters tending to defame

the character of the accused was, we believe, probably in conflict with applicable local decisions and the decisions of this Court.

It is earnestly contended further that this Court ought to review the entire case to determine whether or not there was a sufficiency of evidence and whether or not the errors of the lower Court in demanding to know whether the accused would take the witness stand, during the trial and in the presence of the jury, and the action of the Court with reference to the evidence of two Government inspectors constitute reversible error under the applicable decisions of this Court. The case, we believe, presents a combination of errors which should result in a reversal by this Court. These things will be more particularly referred to in the brief hereto attached.

Wherefore the petitioner respectfully prays for a writ of certiorari for review of the judgment of the United States Circuit Court of Appeals for the Fourth Circuit in this case, and that the said judgment be reversed.

Respectfully submitted,

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